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No. 98-1651

In the Supreme Court of the United States

ROBERT C. KIM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's sentence was based on his status as a naturalized citizen.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 39a-43a) is unpublished, but the judgment is noted at 172 F.3d 45 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1999. The petition for a writ of certiorari was filed on April 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Eastern District of Virginia, petitioner pleaded guilty to conspiracy to obtain national defense information, in violation of 18 U.S.C. 793(b) and (g). He was sentenced

to 108 months' imprisonment. The court of appeals affirmed. Pet. App. 39a-43a.

1. Petitioner was born in Korea in 1940, moved to the United States in 1966, and became a naturalized citizen in 1974. In 1978, the Office of Naval Intelligence hired petitioner as a computer specialist. Petitioner had a high level security clearance that gave him access to secret national defense information. Gov't C.A. Br. 3.

In 1996, while under surveillance by the FBI, petitioner met with Korean officials in Arlington, Virginia, to volunteer his services to that government. During the summer of 1996, the FBI observed petitioner in his office as he, without authorization, printed from his computer classified information relating to Korea. Petitioner then mailed the documents to a Korean Naval attache. The FBI intercepted the documents, copied them, then replaced them for delivery to the attache. The FBI also intercepted petitioner's incriminating telephone conversations with the attache. Gov't C.A. Br. 3-4.

In May 1997, petitioner agreed to plead guilty to a one-count information charging him with conspiracy to obtain national defense information. As part of the plea agreement, petitioner waived his right to appeal any sentence within the ten-year statutory maximum. Gov't C.A. Br. 2.

2. At sentencing, petitioner's counsel asked for leniency, stating that petitioner was politically naive. He stated that petitioner was originally from South Korea and that American soldiers were currently stationed in Korea to protect democracy. Pet. App. 24a. In response, the prosecutor argued that petitioner did not deserve leniency. Referring to a letter that petitioner had written the court, the prosecutor stated that

petitioner had apologized only to Korean-Americans, not to the American people who gave him citizenship or to the federal government that he betrayed. The prosecutor argued that petitioner owed this country his complete loyalty and fidelity, but that he had betrayed the American people, including Korean-Americans. The prosecutor asked for a substantial sentence because petitioner damaged the national security of the country that gave him citizenship. *Id.* at 30a-31a.

During allocution, petitioner said that he was not a spy, but stated that he was accepting responsibility "for violating the privileges of the citizens and the privileges of clearance for many years by the United States government." Pet. App. 31a.

Before imposing sentencing, the district court addressed petitioner. The court rejected petitioner's attempt to portray himself as a naive victim of others. The court noted that petitioner had taken an oath of allegiance to this country; that he had breached that oath and "other oaths in terms of your promise to abide by the requirements of secrecy and those sorts of things." Pet. App. 34a. The court continued:

> In sentencing you, I have looked at all these factors. I have looked at you, Robert Kim the person, but I have to also look at the criminal activity itself that you committed. The Court must take into consideration as well the message that is sent out to others who might be in a similar situation and think it's not so bad to help another country even if I breach an oath to the United States. If that were permitted, all of the secrecy, all of the intelligence community in this country would be significantly impaired, and that can't be permitted.

Ibid. Stating that it would sentence petitioner at the high end of the Guideline range, the court imposed a sentence of 108 months' imprisonment and three years' supervised release. Petitioner did not object to the court's sentence. *Id.* at 34a-35a.

3. The court of appeals affirmed in part and dismissed in part in an unpublished per curiam opinion. Pet. App. 39a-43a. The court of appeals dismissed petitioner's challenges to his sentence based on the Sentencing Guidelines because of the provision in the plea agreement waiving his right to appeal any sentence within the statutory maximum. *Id.* at 40a-41a.[1] The court ruled, however, that the waiver provision did not bar petitioner from challenging a sentence that was based on constitutionally impermissible factors. *Id.* at 41a. The court then considered and rejected petitioner's claims that the sentencing court based its sentence on its "personal sense of religiosity" or on petitioner's national origin. *Id.* at 41a-42a.

With respect to the national origin claim, the court of appeals observed that the district court had "discussed the oath of allegiance * * * taken by naturalized citizens and the oath [petitioner] took to abide by the secrecy requirements of his job with the Office of Naval Intelligence," and had indicated that it must consider the "message" the sentence would send to "others who might be in a similar situation and think it's not so bad to help another country even if I breach an oath to the United States." Pet. App. 42a. The court of appeals concluded that, based on the record, the district court's

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[1] The court of appeals also declined to address petitioner's claim of ineffective assistance of counsel on the ground that petitioner should bring that claim in a separate motion under 28 U.S.C. 2255. Pet. App. 41a.

"concern was the seriousness of [petitioner's] violation of his oaths rather than his national origin or immigration status." *Ibid.* Consequently, the court found "no error" in the challenged remarks. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the sentencing court based its sentence on his natural origin or immigration status in violation of the equal protection guarantee of the Fifth Amendment. That fact-bound contention lacks merit.

The Fifth Amendment bars a sentence that is based on the defendant's national origin or alienage. See, *e.g.*, *United States* v. *Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991). Similarly, the Sentencing Guidelines do not permit sentencing on the basis of national origin. See 28 U.S.C. 994(d) (directing sentencing commission to promulgate Guidelines that are "entirely neutral" as to, among other things, national origin); Sentencing Guidelines § 5H1.10 (1997). A district court may refer, however, to the defendant's national origin or naturalized status at sentencing as long as the defendant's alienage is not the basis for the sentence. *United States* v. *Webster*, 54 F.3d 1, 7 (1st Cir. 1995); *United States* v. *Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994); *United States* v. *Munoz*, 974 F.2d 493, 495-496 (4th Cir.), cert. denied, 506 U.S. 1039 (1992); *United States* v. *Gomez*, 797 F.2d 417, 420-421 (7th Cir. 1986).

The court of appeals correctly concluded that petitioner's alienage was not the basis for the sentence imposed by the district court. The district court explained that petitioner's espionage breached his oath of allegiance as a naturalized citizen and thus his duty of loyalty to his country. Pet. App. 34a. The district court's point was that petitioner's crime was incon-

sistent with his duties as a citizen, however acquired. Thus, although the court referred to the manner in which petitioner acquired his citizenship, it did not base its sentence on that fact. Likewise, the district court's statement that it intended to send a message to those in a "similar situation" referred simply to others who might be tempted to breach an oath of loyalty to this country. See *United States* v. *Munoz*, 974 F.2d at 495-496 ("The court may also impose a sentence to deter similar criminal conduct by others."); *United States* v. *Gomez*, 797 F.2d at 420 (court properly "expressed concern * * * about the increasing numbers of people from Latin countries bringing illegal drugs into the district" and "expressed the hope that the sentence imposed would serve as a deterrent to others" similarly situated).[2]

2. Contrary to petitioner's contention (Pet. 8-10), the court of appeals' decision does not conflict with the decisions of other courts of appeals. Petitioner relies on appellate decisions that have found, on different factual records, that the sentencing court improperly relied on the defendant's alienage in sentencing. See *United States* v. *Leung*, 40 F.3d 577, 585 (2d Cir. 1994) (appearance of impropriety caused when district court stated that "[w]e have enough home-grown criminals in the United States without importing them"; sentence was intended to "deter others, particularly others in the Asiatic community"; and "people [who] want to come to the United States * * * had better abide by our

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[2] Petitioner's failure to object to the district court's comments at sentencing also suggests that, contrary to the position he took on appeal, he did not view the comments at the time as reflecting an intent to sentence him based on his national origin or citizenship. Cf. *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988).

laws"); *United States* v. *Onwuemene*, 933 F.2d at 651 (district court stated that high sentence was warranted because defendant was "not a citizen of this country" and "[w]e have got enough criminals in the United States without importing any"); *United States* v. *Borrero-Isaza*, 887 F.2d 1349, 1351-1357 (9th Cir. 1989) (district court repeatedly stated that sentence was influenced by the fact that the defendant was a "foreigner"). Here, the court of appeals reviewed the record in this case and found that the district court sentenced petitioner based on "the seriousness of [his] violation of his oaths rather than his national origin or immigration status." Pet. App. 42a. That fact-bound holding does not conflict with those decisions and does not merit further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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